IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	
RUSSELL J. CONTI	:	CRIMINAL NO. 95-473-6

RUSSELL J. CONTI	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	CIVIL ACTION NO. 97-7810

MEMORANDUM

Dalzell, J. May 21, 1998

On December 17, 1996, after Russell Conti pleaded guilty, we sentenced him to fifty-seven months incarceration and five years of supervised release for his involvement in a large methamphetamine conspiracy. In establishing the applicable Guideline range for sentencing, we considered, inter alia, a factual stipulation between Conti and the Government that 903 grams of methamphetamine was the quantity of attributable to him.[1]

In his motion under 28 U.S.C. § 2255, Conti argues that (1) his sentence should be reduced because there was no factual basis for the joint stipulation that 903 grams of methamphetamine

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[1] On the basis of the stipulation that Conti was responsible for 903 grams of methamphetamine, he was given a base offense level of 30 under the United States Sentencing Guidelines ("U.S.S.G."). See U.S.S.G. § 2D1.1(c)(5). At his sentencing, Conti received a reduction of three points for acceptance of responsibility, a reduction of two points for meeting the criteria of § 5C1.2, and a reduction of two points for being a minor participant in the conspiracy (for a total reduction of seven levels). Accordingly, Conti's total offense level was 23, thereby placing him in the imprisonment range of 46 to 57 months.

was the quantity attributable to him, and (2) he was denied effective assistance of counsel in agreeing to such a stipulation. In essence, Conti argues that the stipulation is void because his involvement in the conspiracy can only be linked to between 450 to 675 grams of methamphetamine.[2]

We reject Conti's first argument for two reasons.

First, if Conti can successfully attack this factual stipulation that he entered into, it is hard to imagine any defendant who could not likewise undermine the finality of his sentence. Conti four times confirmed the factual stipulation that he was responsible for 903 grams of methamphetamine. In his Guilty Plea Agreement (filed on September 17, 1996), Conti and his counsel both endorsed this number. See Guilty Plea Agreement at ¶ 6.b. Second, neither he nor his counsel objected to the portion of presentence report using the stipulated amount of 903 grams of methamphetamine to determine Conti's base offense level. Third, at his guilty plea colloquy on September 17, 1996, Conti personally and under oath confirmed the contents of the Guilty Plea Agreement and the factual basis for his plea (see, e.g., the transcript of his September 17, 1996 change of plea at 30-33, containing unobjected-to facts that involve Conti in transactions

[2] A defendant who is responsible for at least 400 grams of methamphetamine, but less than 700 grams, results in a base offense level of 28. See U.S.S.G. § 2D1.1(c)(6) (1995 Guidelines Manual). Accordingly, Conti argues that with the same seven point reduction he received at his sentencing in 1996, he would have a total offense level of 21 (rather than 23), thereby placing him in the imprisonment range of 37 to 46 months, rather than 46 to 57 months.

which could, with utter fidelity to U.S.S.G. § 1B1.3(a)(1)(B), be construed as involving as little as one pound or as much as two and a half pounds (1,135 grams) of methamphetamine). Finally, at his sentencing hearing on December 17, 1996, neither Conti nor his counsel objected to the use of 903 grams of methamphetamine to determine his sentence.

Second, we note that the stipulation in this case worked in Conti's favor, as it assured him that his sentence would be no higher than a base offense level of 30. In this case Conti, while a minor player, was part of a large methamphetamine conspiracy, involving at least fourteen other defendants and massive quantities of unusually-pure methamphetamine. According to the terms of ¶ 6 of the Guilty Plea Agreement, and U.S.S.G. § 6B1.4, the parties' factual stipulation was not binding upon either the Probation Office or the Court.[3] Therefore, pursuant to U.S.S.G. § 1B1.3 and on the record of this large conspiracy, we could well have found Conti responsible for just slightly higher quantities of methamphetamine than 903 grams, and, accordingly, determined a higher base offense level.[4] There is

[3] The Commentary to § 6B1.4 provides that in determining the factual basis for a sentence, we may "consider the stipulation, together with the results of the presentence investigation, and any other relevant information." U.S.S.G. § 6B1.4, Commentary at 324.

[4] Had we found Conti responsible for at least one kilogram of methamphetamine, his base offense level would have been 32. See U.S.S.G. § 2D1.1(c)(4) (Drug Quantity Table).

thus no basis to reduce Conti's sentence on the ground that there was no factual basis for the stipulation.

We also will not reduce Conti's sentence for ineffective assistance of counsel.

Strickland v. Washington, 466 U.S. 668 (1984), established a now-familiar two-prong test to evaluate ineffective assistance claims. Under this test, Conti must first prove that his counsel's performance fell below an objective standard of reasonableness and, second, caused prejudice resulting in an unreliable or fundamentally unfair outcome of the proceedings, see id. at 688-95. Conti's prior counsel's stipulation to a fixed amount of methamphetamine, with Conti's full knowledge and consent under oath and on the record, did not fall below the objective standard of reasonableness or result in an unreliable or fundamentally unfair outcome.[5]

On the record of this large conspiracy, as in most drug conspiracies, the standard the Sentencing Commission offers as the polestar for counsel's and the Court's measure -- "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity", U.S.S.G. § 1B1.3(a)(1)(B) -- necessarily affords both counsel and the Court with a wide band of objective reasonableness. Cf.

[5] In fact, it was Conti's prior counsel's efforts and tactics that assured Conti of a maximum base offense level of 30 as well as a reduction of seven levels due to his successful efforts at the sentencing hearing.

United States v. Collado, 975 F.2d 985, 990-95 (3d Cir. 1992). Thus, Conti's fundamental mistake here stems from his confusion of the metaphysical elasticity of the enterprise under § 1B1.3(a)(1) with the exactitude of the apothecary's scale. His counsel manifestly harbored no such confusion, and therefore did not constitutionally, or in any other way, fail his client.

Conti also argues that due to his extraordinary rehabilitative efforts, he should at this late date be awarded a downward departure pursuant to United States v. Sally, 116 F.3d 76 (3d Cir. 1997). See also U.S.S.G. § 5K2.0. In support of this argument, Conti notes that he has completed a forty hour drug program and awaits entrance into a 500 hour drug program. He also maintains that he works outside the prison during the evenings at a veterans hospital in Lebanon, Pennsylvania, and is studying for his G.E.D. diploma.

While we commend Conti on his rehabilitative efforts, and urge him to continue them, we do not find that these efforts are "so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply," Sally, 116 F.3d at 80.

It goes without saying, too, that we could hardly grant a downward departure on the basis of future conduct. The only reason the Court of Appeals afforded Albert Sally the opportunity to make a record on this point is because it ordered a resentencing. Here, unlike Sally, the proffered rehabilitative efforts occurred after Conti's sentence was imposed and became

final. There were, in short, no such efforts that could have been brought to our attention on December 17, 1996. Had we found sufficient merit on other grounds of Conti's motion to warrant resentencing, then -- but only then -- could we consider his laudable post-conviction efforts since that date. Sally does not represent an independent and forever open offer to return for resentencing on this ground alone.[6]

With regard to a certificate of appealability, the new 28 U.S.C. § 2253, as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), now provides, in relevant part, that

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -
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> . . .
>
> (B) the final order in a proceeding under section 2255.
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> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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[6] Sally of course could not do otherwise and remain faithful to the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3673 and 28 U.S.C. § 991 et seq., which among other things abolished parole and the Board which considered it because of a (well-founded) pessimism that any tribunal can safely predict future conduct based upon post-conviction inmate behavior. See S. Rep. No. 98-225, 98th Cong. 2d Sess. (1989), reprinted in 1984 U.S.C.C.A.N. at 3222-48. See also Misretta v. United States, 488 U.S. 361, 367, 109 S. Ct. 647, 652 (1989).

28 U.S.C. § 2253 (1997). We cannot honestly say, in accordance with 28 U.S.C. § 2253(c)(2), that Conti "has made a substantial showing of the denial of a constitutional right," see also United States v. Skandier, 125 F.3d 178, 179, (3d Cir. 1997), and therefore decline to issue a certificate of appealability.

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ORDER

AND NOW, this 21st day of May, 1998, upon consideration of Conti's motion to vacate his sentence pursuant to 28 U.S.C. § 2255, and his memorandum of law in support thereof, and the Government's response thereto, and for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that:

1. Conti's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is DENIED;

2. Conti having failed to make a substantial showing of the denial of a constitutional right, we decline to issue a certificate of appealability; and

3. The Clerk of the Court shall CLOSE Civil Action No. 97-7810 statistically.

BY THE COURT:

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Stewart Dalzell, J.